IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE CIVIL JURISDICTION

WRIT PETITION NO. 5545 OF 2004

Harish Commercial Premises
Co-op Soc. Ltd ...Petitioners.
vs.
Smt. Varsha Dinesh Joshi
and Ors. ...Respondents.

Ms. Shradha Hamdev i/b. M/s. Makhija Associates
for the petitioner.
Mr. N.V. Walawalkar with Y.M. Chaudhari
for respondent no.1 to 6.

CORAM: S.U. KAMDAR, J.

DATE : 1st December, 2005.

JUDGMENT :

1. The present petition raises an issue whether under the provisions of Section 154 of the Maharashtra Cooperative Societies Act, 1960 a power can be exercised to entertain a second revision application. Before I deal with the aforesaid issue for the purpose of narration, few facts of

the present case are necessary which are briefly enumerated as under:-

2. The petitioner is a registered co-operative society of a commercial premises situated at 205/206, S.V. Road, Andheri (West), Bombay-50.

3. It is the case of the petitioner that Respondents before this court are the encroachers upon the open space of the society and have illegally and unlawfully built ‘Bakdas’ in the said premises and now seeking to be made as member of the petitioner society.

4. On 5.8.1978 some persons including one Mr. Bitesh S. Sagar and Nanji Devji Shah representing themselves as Chief promoter of the proposed co-operative Housing Society namely Harish Premises Co-operative housing Society (proposed) purchased the said plot of land and thereafter with the sanction of the corporation constructed a building. It is the case of the petitioner that in the constsruciton of the building the entire FSI of the

said plot was consumed. It is the case of the petitioner that the Respondents are infact the encroachers upon the property of the petitioner society and have carried our various illegal construction. Alternatively it is the case of the petitioner that the respondents do not have any sanction plan for the construction of their Bakdas on the said open plot of land.

5. The respondent no.1 to 6 are claiming to be the owner of the shops/Bakdas in the premises of the petitioner society. They are in possession of the agreement of sale executed by the builder Bitesh S. Sagar who was also the Chief Promoter of the petitioner society prior to its incorporation. The builder has entered into an agreement sometime in or about 1981 when the petitioner society was yet not incorporated. The petitioner society has been incorporated only in the year 1985. Under the said agreement for sale the said builder has sold the open space in the compound of the building for the purpose of putting up the shop. The area which has been sold is 65 sq.ft on the northern side of

the building known as Haresh Premises Co-operative Housing Society. The Respondents have constructed the shop premises with the prior permission of the corporation much prior to the formation of the society i.e in the year 1983-84. The Corporation has granted the permission in the year 1983 by a letter dated 27.8.1983 for the construction of the shop premises. In the permission it has been mentioned that the premises were actually situated on the road and they are affected by set back due to widening at Dawood Baug Raod, Andheri. In the letter dated 27.10.1983 the corporation has accepted the request of the petitioner to allow them to put a shop/Bakda in the said open space of the premises of the petitioner society which they have purchased under the said agreement for sale since their structure was affected by virtue of set back for the road widening project. The respondents are in possession of the said shop for almost 25 years. Immediately on a society being incorporated the respondents who are not permitted to be joined as members of the society raised an issue that they should be added as members of the

petitioner society. On 18.7.1985 they gave notice through their advocates that the respondents be made the member of the said proposed society at that point of time. Subsequently respondents applied for a membership on 11.1.2001. The said membership has been rejected by the petitioenr society on 18.1.2001. Being aggrieved by the said order they preferred an appeal under Section 23 before the Divisional Joint Registrar and by an order dated 21.10.2001 the application of the respondent has been rejected and the decision of the society not to make him the member as been upheld. And by order dated 7.1.2003 the revision applciation of the respondent has been allowed and the petiioners are directed to make the respondent as member of the said society. The said appeal was rejected on the ground that the agreement between the applicant and the builder owner were not submitted to the society as also the permission of the Municipal Corporation permitting them to construct the building was not furnished to the said society. However it is the case of the respondent that infact the agreement as well as the

permission are already furnished to the petitioner society by their letter dated 13.1.2001. In the order of Divisional Joint Registrar it was also observed that the petitioner shall have no other rights on the property of the society save and except the tenaments which are in their possession.

6. Being aggrieved by the said order a second Revision application was filed under Section 154 before the Secretary (Co-operation and Marketing) of State of Mahrashtra. By an order dated 20.10.2003 the said second Revision Application was rejected on the ground that the power of the of second revision is not available under section 154 of the Maharashtra Co-operative Societies Act. It was also held that the second revision application preferred by the petitioner society is not maintainable and thus the same is liable to be rejected.

7. It is this order passed by the Secretary in the second revision application dated 20.10.2003 is a subject matter of a challenge before me on the

ground that the second revision application is maintainable under Section 154 of the Maharashtra Co-operative Societies Act.

8. In so far as the maintainability of second revision is concerned, the learned counsel appearing for the petitioner has contended that in the light of the judgment of the Supreme Court in the case of Ishwar Singh vs. State of Rajasthan and others, reported in (2005) 2 SCC 334 that the second revision is maintainable. It has been contended that the Hon'ble Supreme Court was considering the identical provisions of the Rajasthan Cooperative Societies Act, 1965 which is Section 128 of the said Act and has held that the power conferred on the Joint Registrar and the State Government is concurrent and not alternative and, therefore, a second revisionary power can be exercised under the very same provision of revision under section 128 of the Rajasthan Cooperative Societies Act, 1965. The learned counsel has particularly relied upon paras 13 and 14 of the

said judgment to contend that the second revisionary power can be made applicable. The learned counsel for the petitioner has also contended that in light of the recent judgment of the Supreme Court in the case of Ishwar Singh vs. State of Rajasthan and others (supra) all the earlier judgments of this Court which have taken a consistent view that under Section 154 of the Maharashtra Cooperative Societies Act, a second revision is not available and the power of second revision cannot be exercised by the State Government are impliedly overruled and thus cannot be considered. The respondent society on the other hand has brought to my attention the judgments of the learned Single Judges of this Court, particularly the unreported judgment of Lodha, J. in W.P. No. 4180 of 1998 dated 18.2.1999, the judgment in the case of Bhupendra Villa Premises Co-operative Society Ltd., and another vs. Chandrakant G. Shah and others, reported in 2001 (2) Mh.L. J. 834. a judgment of another learned Single Judge in the case of Shri Ramesh T. Gopalani vs. The Janata Sahakari Bank Ltd., and

another, reported in 2000 (3) Bom. C. R. 474, a judgment of another learned Single Judge in the case of Virendra Bhanji Rathod and others vs. Anand Vihar Co-operative Housing Society Ltd., Mumbai and others, reported in 2004 (1) Mh.L.J. 656 and lastly the judgment of another learned Single Judge in the case of Dadar Avanti Co-operative Housing Society Ltd., vs. State of Maharashtra & Ors., reported in 2005 (2) Bom. C.R. 604. Each of the aforesaid judgment have taken a consistent view that the power of revision under Section 154 of the Maharashtra Cooperative Societies Act, 1960 cannot be exercised twice over and once the power having been exercised by the Registrar or the Secretary, the said power is exhausted and revision against the order of Registrar in exercise of revisionary power under Section 154 is not maintainable before the Secretary and/or Minister of Co-operation of the State of Maharashtra under very same provision of law. The view has been consistently taken that the power of revision can only be exercised once and cannot be exercised twice over under section 154 of

the Act. However, the larned counsel for the petitioner has vehemently contended that the aforesaid views are all impliedly overruled by the recent judgment of the Apex Court in the case of Ishwar Singh vs. State of Rajasthan and others (supra). I have considered the judgment of the Supreme Court in the case of Ishwar Singh vs. State of Rajasthan and others (supra). Firstly, in my opinion the said judgment has no application because the provisions of Section 128 of the Rajasthan Cooperative Societies Act, 1965 is in para materia different to the provisions of the present case. The power under section 128 is simultaneously conferred on the Government and the Registrar because the opening words of the provisions of Section 128 reads as under :-

> "The State Government and the Registrar may call for and examine the record of any enquiry or proceedings of any other matter."

In contrast to the same, the provisions of section 154 does not give a concurrent jurisdiction to the Registrar and the State Government because the words prescribed thereunder are "the State Government or the Registrar may call for and examine the records." The wording in that section by substitution of the word "or" in place of "and" is materially significant because in case where the word "and" is used is a coinjoint power conferred both on the Registrar as well as the Government whereas the word "or" indicates that it is the power conferred on ’either’ or ’or’ in such cases the power cannot be exercised by both but it can be exercised by one of the two and in that view of the matter, I am not inclined to accept the contention that by virtue of the judgment of the Apex Court in the case of Ishwar Singh vs. State of Rajasthan and others (supra) all the learned Single Judges judgments of this Court interpreting the very section 154 are deemed to be impliedly overruled. Thus,the contention that the order passed by the Secretary holding that the second revision is not maintainable is bad in law is rejected. The order

passed by the Secretary holding that the second revision is not maintainable is upheld.

9. Alternatively, the learned counsel for the petitioner has contended that the order passed by the Divisional Joint Registrar is illegal and is liable to be quashed and set aside on merit and this court must consider the said order dated 7.1.2002 passed by the said Divisional Joint Registrar. Learned counsel for the petitioner has contended that the respondents are not entitled to be members inrespect of the said premises in the petitioner society because firstly the respondents are the encroachers upon the open space of the society and secondly the construction carried out by them in the open space of the society is illegal, unlawfull and unauthorised and contrary to the provisions of the BMC Act and without the permission of the Corporation.

10. It has been contended that a person who is an encroacher and a person who carries out

unauthorised construction in the premises of the society is not entitled to and/or eligible to be made as member of the petitioner society and thus the rejection of the membership of the respondents by the petitioner society was legal and justified and that the Divisional Joint Registrar in exercise of revisional power was not correct in setting aside the order of the Deputy Registrar who has passed an order upholding the rejection of the membership of the respondents under Section 23 of the Maharashtra Co-operative Societies Act, 1960. Learned counsel for the petitioner has further contended that the agreement on which the reliance has been placed is not a valid agreement because Bitesh S. Sagar has no authority or power to enter into the said agreement as he was merely a chief promoter of the proposed co-operative housing society and could not have entered into the said agreement. It has been contended that the respondents have constructed the structure without authority and without the permission from the Corporation and therefore the structure is illegal and are thus subject to demolition under Section

351 of the BMC Act and therefore the respondents are not entitled to be the members of the petitioner society.

11. On the other hand the learned counsel for the respondent has produced before me the permission granted by the Corporation and even the sanction plan given by the Corporation giving them the authority and sanction for construction on the said open plot of land. The rights in the land was conferred on the respondents by entering into specific agreement between the builder Bitesh Sagar with the respondents herein. The agreement is on record. There is no dispute as to the agreement which has been entered into already as far back as in 1981. The petitioner society has not taken any steps by filing civil proceedings or civil suit challenging the said agreement and seeking cancellation thereof. Thus at this stage to hold that the respondents are not entitled to the membership because there is no valid agreement entered into by them is not possible. Apart from the aforesaid fact I am of the opinion that the

contention of the learned counsel for the petitioner totally lacks merits. It is because firstly the builder has entered into conveyance in 1978 being the chief promoter of the proposed society, the present members were not in the scene in 1978. Thus after the conveyance is obtained the builder has sold the commercial premises to various persons who have subsequently become the members of the petitioner society. Thus the members of the petitioner society are holding the said agreement from Bashitesh Sagar in his capacity as builder and thus they have become entitled to become a member of the petitioner society. It is not possible to accept the contention of the learned counsel for the petitioner that while it comes to creating the rights in commercial premises in favour of the member of the petitioner society Bitesh Sagar had an authority and power to enter in to such an agreement but when it comes to the execution of the right in favour of the respondent the very same Bitesh Sagar had not authority to enter into such an agreement. In my opinion prior to the society being registered the builder has constructed the

building for the proposed Co-operative housing society and thereafter sold to various persons commercial premises in the said building. It is these purchasers of the commercial premises who have subsequently formed the society and have become the members thereof. Similarly the said premises are sold to the respondent by the very same builder and has been given a power to construct the structure thereon. In so far as the respondents are concerned they is another important factor which has to be taken into consideration. Originally the respondents were having a structure on the road but for the purpose of construction of the building and for the purpose of road widening the said structures of the respondents have been demolished and as and by way of an alternate accommodation an arrangement has been arrived at between the promoters of the then proposed society and corporation under which expressly it has been agreed that the respondent will be accommodated in the premises of the petitioner society by the builder and on that basis permissions are issued by the Corporation and sanction plan permitting the

respondents to carry on construction on the small portion of the open premises of the building so as to rehabilitate them has been granted. The permission and sanction plan which are produced before me by the respondents leaves no manner of doubt that the construction of the respondents are legal, valid and that the respondents have infact acquired the right in the said premises by entering into usual agreement with the builder as far back as 1981. The respondents are in possession of the said premises right from 1983 when the structure has been constructed by them pursuant to the rights created in their favour. The respondents having given up their original accommodation on the basis of aforesaid alternate accommodation arrived at, it is not possible to accept the contention of the petitioner that they should not be made member of the petitioner society. Membership of the society is an open membership and if a person is in lawful possession of a premises of the society then the membership cannot be refused to such a person. By not adding the respondent as a member of the society would amount to denying the benefits of the

membership under the Act conferred on each and every person who is the occupier of the premises of the building. In any event I do not find any compelling reason that the respondents should not be made the members of the petitioner society. The rights of the respondents prima-facie cannot be held illegal under the said agreement nor a structure can be considered as unauthorized when there is a permission from the Corporation.

12. In any event I am of the opinion that in the proceedings arising under section 23 of the Maharashtra Co-operative Society Act what is required to be considered is prima-facie whether the respondents who are claiming to be the member are the lawful occupiers and have right, title and interest in the said property on the basis of which he is seeking membership of the society. The jurisdiction of the Registrar under section 23 does not extent to determine the validity and/or otherwise the documents which are already executed in favour of the concerned person because that is the jurisdiction of the civil court and if any

person raising any challenge to the said agreement is required to file appropriate civil suit. Prima-afacie in this case the respondents have got an agreement in their favour and also permission in their favour from the BMC for the purpose of constructing the said property. In that view of the matter I am of the opinion that the contention raised by the petitioner that the respondents are not entitled to be the member because they are unlawful and unauthorised occupier of the said construction cannot be accepted. In that view of the matter, petition fails. The order passed by the Divisional Joint Registrar dated 7.1.2002 is confirmed. However theres shall be no order as to costs.

sd/-

****